Nos. 83-812 - 83-929

IN THE

Supreme Court Of The United States

October Term, 1983

George C. Wallace, Governor of the State of Alabama, et al.,
Appellants

v.

Ishmael Jaffree, et al.,
Appellees

Douglas T. Smith, et al.,
Appellants

v.

Ishmael Jaffree, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Appellees, Ishmael Jaffree, et al.

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STATEMENT OF THE CASE

In 1978, the governor of Alabama signed into law Ala. Code § 16-1-20.[1] This statute required public school teach-

[1]Ala. Code § 16-1-20 provides:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation."

ers during the first class of each day to enforce a period of silence for "meditation." The act limited its reach to grades one through six in all public schools.

There is no recorded legislative history for § 16-1-20, and the statute doesn't appear to lend governmental support to religion, therefore appellees raise no objection to this statute and it is not currently under challenge. Appellees accordingly acquiesce to the arguments raised in the Brief of the State of Connecticut as Amicus Curiae.

During the 1982 regular session of the Alabama legislature, State Senator Donald G. Holmes was approached by several people and asked "Why don't you introduce a Voluntary Prayer Bill?" (J.A. at 48.). Recognizing that the existing "silent meditation law" was inadequate for voluntary silent prayer, and being committed to the "return of voluntary prayer to our public schools" Senator Holmes introduced Senate Bill 60 (Ala. Code § 16-1-20.1).[2]

Section 16-1-20.1 amended § 16-1-20 in three material aspects; first, it extended its coverage to all grades in all public schools. Next, it gave the teacher discretion on whether to enforce the period of silence. Finally, it expressly allowed the teacher to announce that the enforced period of silence may be used for "voluntary prayer".

On May 28, 1982, Appellee, Ishmael Jaffree (Jaffree), on behalf of his three minor children,[3] who were enrolled in three separate public elementary schools in Mobile County, Alabama, filed an action against various county

[2]Ala. Code § 16-1-20.1 (Cum. Supp. 1982) provides:

> "At the commencement of the first class of each day in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3]Mr. Jaffree currently has five pre-teen age children enrolled in the public schools of Mobile County, Alabama.

public school officials alleging state sponsorship of a program of religious exercises. (J.A. at 3-13.).

After learning of Jaffree's lawsuit, the Governor convened a special session of the state legislature and requested that it act on a bill drafted by his son. This bill included a state-composed prayer to be recited at the beginning of any homeroom or class period. The legislature acted, and this bill (Ala. Code § 16-1-20.2) became law.[4] The legislature, during this same special session, also passed another bill (S.B. 61). This bill also required the recitation of prayers in the public schools.[5] The Governor refused to sign the bill and it died.

After passage of Ala. Code § 16-1-20.2, Jaffree amended

[4]The bill (now Ala. Code § 16-1-20.2 [Cum. Supp. 1982]) provides:

> "From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in th efollowing prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classroom of our schools in the name of the Lord. Amen."

[5]S.B. 61 provides:

> To prescribe a period of time in the public schools, not to exceed 15 minutes, for the study of the formal procedures followed by the United States Congress which study *shall* include the reading verbatim of one of the opening prayers given by either the House or Senate Chaplin at the beginning of the meeting of the United States House or Senate.
>
> BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:
>
> Section 1. At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which said class is held *shall*, for a period of time not exceeding 15 minutes, instruct the class in the formal procedure followed by the United States Congress. The study *shall* include, but not be limited to, a reading verbatim of one of the opening prayers given by either the House or Senate Chaplain at the beginning of the meeting of the House or Senate. Any student may select an opening House or Senate prayer from the Congressional Record for use by the class.

his complaint to request the court to enjoin and have declared unconstitutional both §§'s 16-1-20.1 and 16-1-20.2 (J.A. at 21-29). Jaffree also moved to have the state temporarily enjoined from enforcing the provisions of these statutes. The court treated this motion as a motion for a preliminary injunction. (R. at .....) Finally, Jaffree motioned the court to consolidate the hearing on the preliminary injunction with the trial on the merits. (R. at). This motion though initially granted was subsequently denied upon objection from the county defendants. (R. at).

On August 2, 1982, the trial judge severed Jaffree's complaint and amended complaint into two separate causes of action, allowed, over objection, seventeen people to intervene as party-defendants, and took testimony concerning the preliminary injunction. (R. at 252-57, 282 and 704).

On August 9, 1982, after two days of testimony, the trial court issued a preliminary injunction prohibiting the enforcement of both Ala. Code §§'s 16-1-20.1 and 16-1-20.2. The trial court found that on its face Ala. Code § 16-1-20.2 had the purpose and effect of advancing religion, and, in light of its legislative history, § 16-1-20.1 did not "reflect a clearly secular purpose". *Jaffree v. James*, 544 F.Supp. 727, 732 (S.D. Ala. 1983).

After the trial in the county case, the court dissolved the injunction and dismissed both actions. The court held that the First Amendment does not limit the state from establishing a religion, and the Fourteenth Amendment was never intended to apply the first eight Amendments to the states. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (S.D. Ala. 1983); *Jaffree v. James*, 554 F.Supp. 1130 (S.D. Ala. 1983).

Jaffree appealed both actions to the Eleventh Circuit and requested, by motion, a stay and injunction pending

appeal. Upon the denial of the motion, Jaffree requested Justice Powell, as Circuit Justice, to stay the trial court's judgment and reinstate the injunction. Justice Powell granted the stay, reinstated the injunction as to both statutes and issued a brief opinion explaining the reasons for his action:

> Unless and until this Court reconsiders the foregoing decisions, (*Engel v. Vitale*, 370 U.S. 421 [1962], and *School District of Abington Township v. Schempp*, 374 U.S. 203 [1963]) they appear to control this case. *Jaffree v. Board of School Commissioners of Mobile County*, ... U.S. ....., 103 S.Ct. 842, 843 (1983).

The Eleventh Circuit agreed, reversed the district court, and remanded the case for entry of an order enjoining implementation of both statutes. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). The State and the intervenors appealed to this court. This Court affirmed the Eleventh Circuit's decision with respect to Ala. Code § 16-1-20.2, but noted probable jurisdiction regarding the constitutionality of Ala. Code § 16-1-20.1. *George C. Wallace, et al. v. Ishmael Jaffree, et al.*, ... U.S. ....., 104 S.Ct. 1704 (1984). (Justice Stevens, though concurring, expressed his understanding that the limited scope of review precluded the issues of (a) whether the Establishment Clause limited the states from establishing a religion, and (b) whether the Fourteenth Amendments made the First Amendment applicable to the states).

SUMMARY OF THE ARGUMENT

Congress Shall Make No Law Respecting An Establishment of Religion, or Prohibiting the Free Exercise Thereof.[6]

The First Amendment is as simple in its language as it is majestic in its purpose. It was intended to establish the immutable principle that this country is committed to the ideal of religious freedom which, concomitantly, includes freedom *from* religion. "This freedom was first in the Bill of Rights because it was first in the forefathers' minds: it was set forth in absolute terms, and its strength is its rigidity". *Everson v. Board of Education*, 330 U.S. 1, 26 (1947).

The framers of the First Amendment meant to make it quite clear that religion was none of the business of government. Government has no right to tell a person; (A) what he may believe about religion; (B) what forms of religious exercises he may practice, or (C) that he must believe in religion at all. The framers were well aware that many of the early settlers had fled to this country from Europe to escape laws which compelled them to support and attend government favored churches. *Everson, supra,* at 8. Many had personally witnessed the civil strife and persecutions generated by established sects. (id. at 9). These persecutions took the form of fines, jailings, tortures, and in many instances, murder. (id.). Men and women of minority faiths were persecuted because they insisted in worshiping God as their conscience dictated (id. at 10). Public indignation over the civil strife and the persecution of religious minorities "found expression in the First Amendment". (id. at 11).

In enacting Ala. Code § 16-1-20.1, which authorized pub-

[6]U.S. Const. Amend. 1. The fourteenth amendment made this prohibition applicable to the states with equal force. *Cantwell v. Connecticut*, 310 U.S. 296 (1970); *Everson v. Board of Education*, 330 U.S. 1 (1947).

lic school teachers to enforce a period of silence for group prayer, the Alabama legislature made a "law respecting an establishment of religion" or "tend (ing) to do so".[7] The fact that the statute also permits meditation is of no consequence. "The use of 'or' in a moment of silence statute serves only to make prayer voluntary, and the fact that participation in prayer is voluntary cannot serve to free it from the limitations of the Establishment Clause. Thus, if a moment of silence for prayer is unconstitutional, so is 'a moment of silence for prayer or meditation, or for prayer or meditation or daydreaming".[8] Further, "(i) t cannot be seriously argued and certainly cannot be assumed that school children can discern the nice distinctions concerning the meanings of 'meditation', . . . and 'prayer'. *Duffy v. Las Cruces Pub. Schools*, 557 F.Supp. 1013, 1016 (D.N. Mex. 1983).

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non conformity is not an outstanding characteristic of children.
>
> *McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J. concurring).

This Court has recently reaffirmed the utility of resorting to the tri-part test fashioned in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) to determine whether a challenged law or act contravenes the prohibition of the Estab-

[7]The Chief Justice has recently suggested that any official conduct which tends to establish a religion or religious faith, fails to pass muster under the establishment clause. See *Lynch v. Donnelly* _____ U.S. _____, 104 S.Ct. 1355, 1361 (1984).

[8]See Note, The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools, 96 Harv. L. Rev. 1874, 1882 (1983).

lishment Clause.[9] The *Lemon* test requires the state to demonstrate; first, that the statute has a secular purpose; second, that its principal or primary effect be one that neither advances nor inhibits religion; and third, that the statute does not foster an excessive governmental entanglement with religion. *Lemon, supra*, at 612-613. Further, if a statute fails to meet any of these standards then it *must* fail to meet the first amendments prohibitions. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

In applying the *Lemon* test to Ala. Code § 16-1-20.1 the trial court found that the statute did not "reflect a clearly secular purpose". *James, supra*, at 732. The court further found that "the enactment of . . . § 16-1-20.1 (was) an effort on the part of the State of Alabama to encourage a religious activity" in the public schools. (id.).

The breach of the impregnable "wall" warned of by *Everson's, supra*, dissenters confronts this Court. The modern court has referred to the "wall of separation" as a useful figure of speech—a metaphor if you will. *Lynch v. Donnelly*, ... U.S. ....., 104 S.Ct. 1344, 1359 (1983). The Court has also viewed it as "far from being a 'wall', it is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". *Lemon, supra*, at 614. (requoted in *Lynch, supra* at 1362). Seizing upon this and other loose language in some of the Court's opinions, the State advances the theory that it can sponsor group prayer exercises to "accommodate" the needs of those students who wish to pray.[10] The Solicitor General, likewise, argues that Alabama's silent prayer statute should be viewed as a constitutional means of "accommodating the religious and meditative needs of students".[11]

[9]The Chief Justice, speaking for the majority in *Lynch v. Donnelly, supre*, at 1362 found it useful to employ the test in the line-drawing process, but emphasized the unwillingness of the Court to "be confined to any single test or criterion in this sensitive area". However, Justice Brennan, in dissenting, noted that the Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772-773 viewed the *Lemon* test as mandatory. Id at 1371, N.2.

[10](App. Br. at 37-38). See also, Intervenors' Br. 10-13.

The government's "accommodation" argument falls from its own weight. There was not one scintilla of evidence offered during the hearing on the preliminary injunction, that the legislators' enacted § 16-1-20.1 for the purpose of accommodating the religious needs of the students. The statute is written in the permissive, therefore, no public teacher is required to "accommodate" the spiritual needs of the students. Further, silent prayer is a natural inalienable right incapable of being surrendered or transferred and therefore is not burdened by state action. Absent the state's enforced one minute of silence, the students have complete freedom to offer a personal private prayer during any of the other 23 hours and 59 minutes of the day—without any religious persecutor being the wiser.

With great difficulty the state attempts to argue that this case creates tension between the Establishment and Free Exercise Clauses. (App. Br. at 6, 7, 16, 30-33). The Solicitor knows better. "(I)t is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day". (S.G. Br. at 10). A public school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of his religion.[12]

The fatal flaw in the State's argument is that here, the State is attempting to *promote* or facilitate a religious exercise (i.e.; group prayer). The Free Exercise Clause, on the other hand, prevents the state from making any law or taking any act which *prohibits* religious exercises.

> [W]hile the Free Exercise Clause clearly prohibits the

[11](S.G. Br. at 11).

[12]L. Tribe, Constitutional Law § 14-8 (1978).

use of state action to deny the right of free exercise to anyone, it has never meant that a majority could use the machinery of the state to practice its beliefs.

Abington School District v. Schempp, 374 U.S. 203, 226 (1963).

The first amendment prohibits the state from transforming an individual's right to silently pray, at any time, into a formal act of group worship in a tax supported public institution attended by individuals of all faiths and beliefs, including non-believers. For the state to demand the right to enter these diversely populated institutions in order to exercise our religious freedom is not freedom at all, but a perversion of freedom, bordering on religious fanatacism and despotism.

ARGUMENT

I. Alabama's Statute Which Authorizes Public School Teachers to Prescribe Daily Periods of Enforced Silence for Group Meditation or Group Prayer Violates the Establishment Clause.

A. *Unless Or Until This Court Reverses Its Holdings In* Engel, Schempp, *And Stone, They Appear To Control The Prayer Exercises At Issue Here.*

In 1978, the Alabama legislature passed an act which required public school teachers in grades one through five to enforce a moment of silence for meditation.[13] Ostensively, students may use this moment to doze, daydream, "think about yesterday's football game or tonight's date" or even to pray,[14] and "no one will be the wiser". This statute cre-

[13]This act (§ 16-1-20) is set out in full on page 1 infra.

[14]Meditation has been defined as "a term . . . referring to protracted concentration of thought on supernatural dights of the divine world, and of the spiritual world in general." Encyclopedia Judaisa 1218 (1971).

ated no controversy nor was it the subject of any suit at law. It is not now.

In 1982, in order to breathe religious life into its silent meditation statute, the Alabama legislature amended § 16-1-20 to expressly include "prayer" as the preferred activity in which the students and teachers may engage during the reverent moment of silence.[15] This amendment extended its largess to "all grades in all public schools". Section 16-1-20 was not expressly repealed and is still "good law" in Alabama.[16] With the enactment of § 16-1-20.1 the State of Alabama put its official seal of approval on state sponsored organized group prayer in its public schools. Whether verbal or silent, "prayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people". *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981) aff'd 445 U.S. 913.

In a long and impressive line of cases beginning with *Everson v. Board of Education, supra,* and culminating with *Stone v. Graham,* 449 U.S. 39 (1980), this Court has uniformally held that nowhere is it more important than in our public schools that we keep the "wall of separation" between church and state high and impregnable.

Though a slim majority in *Everson, supra,* upheld, against a constitutional attach, a New Jersey statute which permitted school officials to reimburse Catholic parochial school parents for the transportation expenses of their children, the court unequivocally stated that the Establishment Clause must be given a "broad interpretation in light of its

[15]Ala. Code § 16-1-20.1. The full text of this statute is set out on page 1 infra.

[16]Because Ala. Code § 16-1-20.1 did not expressly repeal § 16-1-20 and in view that the former is permissive while the latter is mandatory, it is unclear whether some public schools teachers have an option of preceeding under one or the other.

history and the evils it was designed forever to suppress". (id. at 14-15).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor *influence* a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in *any* religion.
>
> . . . . In the words of Jefferson, the clause was intended to erect a wall of separation between Church and State. (citations omitted) (emphasis added).
>
> (id. at 15, 16).

Justice Jackson, in dissent, noted:

> Our public school . . . is a relatively recent development dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teachings so that the school can inculate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.
>
> (id. at 23-24).

Justice Rutledge explained that prohibiting religious training, teaching and observances in public schools does not demonstrate hostility toward religion.

> . . . . It does not deny the value or the necessity for religious training, teaching or observances. Rather, it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, *neither can it perform or aid in performing the religious function*. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. (emphasis added).
>
> (id. at 52. Rutledge, J. dissenting).

In *McCollum v. Board of Education*, 333 U.S. 203 (1948) this Court was called upon for the first time, to decide whether the Establishment Clause prevented the state from inviting religious instructors, employed by religious groups, into the public classrooms on a weekly basis to provide religious instruction. In finding this practice unconstitutional this Court stated:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings.
>
> (id. at 211).

Justice Frankfurter admonished, in his concurring opinion:

> Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but *especially through its educational agencies*, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people. (emphasis added).
>
> (id. at 215).

On the role of the public school in American society, Justice Frankfurter added:

> Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects.
>
> (id. at 216-217).

Though this Court in *Zorach v. Clauson,* 343 U.S. 306 (1952) upheld against a constitutional challenge New York's release program, it did not retreat one inch from its long held position that between church and state the "separation must be complete and unequivocal". (id. at 312). This case was distinguished from *McCollum, supra,* because the program of religious instruction took place off school premises and involved no on-going contact with public school officials. The court noted the narrowness of its holdings:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or *some religion* on any person. . . .
>
> It may not make a religious observance compulsory. . . . *But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.* (emphasis added)
>
> (id. at 314).

In the first of two landmark decisions, this Court was faced, for the first time, with the question of whether the state could sponsor, as part of its program of public education, voluntary, non-coercive prayers. In *Engel v. Vitale,* 370 U.S. 421 (1962) the New York Board of Regents promulgated a prayer for teachers and children to recite in its public school classrooms. Participation was voluntary in that children were excused from the room if they did not wish to recite the prayer. This Court, in finding this "program of prayer" activity unconstitutional, held:

> (T)he fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores

> the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.
>
> (id. at 430).

The Court added:

> The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permits its 'unhollowed perversion' by a civil magistrate.
>
> (id. at 431-432)

The Court, in conclusion, noted:

> It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing *or sanctioning* official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.
>
> (id. at 435) (emphasis added).

In the second of the landmark cases, *Abington School District v. Schempp,* 374 U.S. 203 (1963), this Court was again faced with the question of the permissible range of governmental excursion into the affairs of religion. At issue in *Schempp, supra,* was whether the government could require the reading of certain scriptures from the Holy Bible, without comment, at the opening of the school day with provision being made to excuse any non-consenting child. Also at issue was the state's practice of requiring daily recitation of the Lord's Prayer.

After reviewing the history of the Court's Establishment Clause cases, Justice Clark, speaking for the majority, laid to rest petitioner's argument that to deny the majority the

use of the public school classrooms is to deny them their free exercise rights.

> Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.
>
> (id. at 225-226).

Finally, we come to this Court's most recent pronouncement concerning state sponsored religious activities in public schools, *Stone v. Graham, supra.* As in the present case, *Stone* involved a statute permitting a passive advancement of religion. *Stone* involved a Kentucky statute which required the posting of the Ten Commandments on the wall of each public classroom. The statute also articulated a secular purpose. This Court's Per Curiam opinion, employing the three part standard articulated in *Lemon v. Kurtzman, supra,* had no trouble in finding the statute unconstitutional. In response to the argument that the statute requires "passive" observance of the decalogue, the court observed:

> It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the *mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government* that the Establishment Clause prohibits. (citation omitted). Nor is it significant that the Bible verses involved in this case are merely posted on the wall, rather than read aloud as in *Schempp* and *Engel,* for 'it is no defense' to urge that the religious practices here may be relatively minor encroachments on the First Amendment.
>
> (id. at 42).

B. *Alabama's Silent Prayer Statute Must Be Judged By the Three Part Standard Fashioned in* Lemon v. Kurtzman.

The State of Alabama has passed a law authorizing a silent prayer period in its public schools. Because silent prayer appears so innocent there is a tendency to view the state's action as innocuous at best and de minimis at worst. Lest we get lulled into a state of complacency we are best to remember that "prayer is serious business—serious theological business." *Marsh v. Chambers,* ..... U.S. ....., 103 S.Ct. 3330, 3379 (Brennan J. dissenting). The states are not free to make public business the business of religious worship. *Everson, supra* at 26 (Jackson J. dissenting). "By reason of the First Amendment, government is commanded to have no interest in theology or ritual . . . . for on these matters government must be neutral." *Engel, supra* at 443 (Douglas J. concurring).

Section 16-1-20.1, which encourages collective classroom prayer, was an obvious and transparent effort on the part of the state to restore organized religious activity to the public school. The district court, after two days of testimony, reached this result. *James, supra,* at 731. Unless this Court is now prepared to abandon its three part *Lemon* test,[17] the challenged statute clearly fails to pass muster under the Establishment Clause. This test requires the challenged statute to: (a) have a secular purpose; (b) have a

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[17]Both the district court and the court of appeals applied the *Lemon* test to the challenged statute. Should this Court develop a new legal standard solely for this case, then the injustice warned of by Justice Rehnquist will be apparent:

> If this case is to be judged by a standard not employed by the court below and if the new standard involves factual issues or even mixed questions of law and fact, that have not been addressed by the District Court, the Court should not itself purport to make these factual determinations.
>
> *Larson v. Valente,* _____ US.S _____ 102 S.Ct. 1673, 1691 (Rehnquist J. dissenting).

principal or primary effect which neither advances nor inhibits religion, and (c) avoid an excessive government entanglement with religion. *Jaffree v. Wallace,* 766 F.2d 1526 (11th Cir. 1983). The State has failed to carry its burden with respect to any of the three standards.

C. *Alabama's Silent Prayer Statute Was Enacted For the Express Purpose of Advancing Collective Prayer In the Public Schools.*

During the hearing on the preliminary injunction the state failed to offer any evidence of a secular purpose for § 16-1020.1. The only evidence offered concerning legislative purpose was the testimony of Senator Donald S. Holmes. Senator Holmes admitted to having a religious purpose only, in sponsoring § 16-1-20.1.

> Q Whether you had any other purpose other than, as you stated, to return voluntary prayer to public schools, did you have any other purpose in sponsoring this particular legislation?
>
> A No, I did not have no other purpose in mind.
>
> (J.A. at 52).

The State failed to offer evidence on "secular purpose" because none existed. This is evident when you consider that the trial court initially granted Jaffree's motion to consolidate the trial on the merits with the hearing on the preliminary injunction.[18] This action by the court put the State on notice that it should prepare its case. We must assume that the State appeared at the hearing prepared to argue its case. Yet the State offered no evidence of a secular purpose. There is no evidence that any other legislator, other than Senator Holmes, discussed § 16-1-20.1. We can surmise that the legislature, with a "nod and a wink"

[18]See discuss at 2 infra.

passed the bill without resort to an extended debate as to its purpose.

The State does not deny that it had a religious purpose in enacting § 16-1-20.1. The State instead relies on Justice Brennan's concurrence in *Schempp, supra,* in which he suggest that "the observance of a moment of reverent silence in the class" may satisfy the strictures of the Establishment Clause. (id. at 281). The State reads too much in Justice Brennan's statement. Justice Brennan was not speaking for the Court, and no other justice joined in his opinion. The Court was not presented with the question of the constitutionality of a statute prescribing a moment of silence for prayer. In fact, no such statute existed in 1963 when *Schempp* was decided. Justice Brennan was speaking hypothetically without the benefit of seeing a silent meditation statute in print or in operation. Finally, the Court had not yet formulated the three part *Lemon, supra* test employed by it in subsequent decisions.

The State suggest that the purpose part of the *Lemon* test should be modified so that a statute is only deemed unconstitutional if its purpose is "solely religious" and if it is likely to impar religious freedom by coercing, compromising, or influencing religious beliefs. (App. Br. at 16). This suggested modification found some support in this Court's recent decision in *Lynch v. Donnelly, supra.* The Chief Justice, speaking for apparently a plurality, observed that the Court has in the past, invalidated legislative action, but only when the Court concluded that the statute or activity was motivated "wholly by religious considerations". (id. at 1362). However, it is doubtful that this is the position of the full court.

Justice O'Connor concurring in *Lynch, supra,* found the purpose prong of the *Lemon* test to be broader than that outlined by the Chief Justice:

> The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement *is not* satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes . . .
>
> The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the Government intends to convey a message of endorsement or disapproval of religion (emphasis added)
>
> (O'Connor, J. concurring at 1368)

Also supporting this broader interpretation of the "purpose" prong was Justice Brennan. Justice Brennan, whose opinion was joined by Justices Marshall, Blackmun and Stevens, reasoned that the test was first developed to express the essential concerns animating the Establishment Clause. Thus, the test is designed to insure that the organs of government remain strictly separate and apart from religious affairs. Justice Brennan reminded the Court that it should always be alert in its examination of any challenged statute or practice "not only for an official establishment of religion, but also for those other evils at which the Clause was aimed—'sponsorship, financial support, and active involvement of the sovereign in religious activity'. (citation omitted) (id. at 1372). In light of these concerns, Justice Brennan reasoned that any challenged statute or act must reflect a "clearly secular purpose" (id).

The Intervenors, similarly, do not mention a secular purpose in the enactment of § 16-1-20.1. They instead suggest that in this case the Court should do away with its three part test and use the historical test fashioned in *Marsh v. Chambers*, ... U.S. ....., 103 S.Ct. 3330 (1983).

The historical test is not applicable to this case for two principle reasons. First, there is no history of long duration concerning statutes which require or permit moments of

silence for prayer in the public schools. Prior to 1978 no silent meditation statutes existed.[19] Secondly, even if there was a history associated with organized silent prayer in the public schools, Justice Brennan, in his eloquent concurrence in *Schempp, supra,* explained why that history can no longer govern this case.[20]

The most attractive argument raised concerning legislative purpose is that of the Solicitor General. The Solicitor argues that notwithstanding the fact that some legislators may have had a religious purpose in enacting § 16-1-20.1, if their means of accomplishing this purpose were within the permissible bounds of "accommodation", then the statute should be constitutional. (S.G. Br. at 13, Dec. 1983). The Solicitor further argues that "the whole point of religious accommodations is to create opportunities for persons to pursue their own beliefs and thus to provide an environment in which "voluntary religious exercise may flourish". (citations omitted) (id.). After admitting that no Free Exercise claim can be raised under the circumstances of this case, the Solicitor then proceeds to say that Alabama's silent prayer statute is merely an attempt on the part of the state "to facilitate the free exercise of religion". (S.G. Br. at 19, July, 1984). The Solicitor, therefore, rationalized that § 16-1-20.1 was merely an "accommodation" of the free exercise rights of students.

The Solicitor fails to recognize three important problems with this analysis applicable only to the facts of this case. First, nothing in § 16-1-20.1, with respect to accommodating individual's religious needs, is not accomplished by its prececessor, § 16-1-20. Next, if the State had in mind "accommodating", on a non-discriminatory basis, individual students' religious needs it would not have worded the

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[19]See S.G. Br. at 6. n. 5.

[20]See Abington v. Schempp, supra at 267-278, (Brennan J. concurring).

statute in the permissive. Finally, the silent prayer needs of students need not, and, in fact, cannot be accommodated by any acts of the state.

The Solicitor's post hoc rationalizations notwithstanding, it was the intent of the Alabama legislature to sponsor organized group prayer as a daily fixture in the public schools. They were well aware that any child could silently pray under the existing statute.[21] Further, § 16-1-20.1 was not intended as a mere acknowledgement by the state of the role that religion has played in American life. *Lynch, supra* at 1360. Nor was its purpose to "accommodate all faiths and all forms of religious expression, and show hostility towards none. (id. at 1361). As will be discussed below, "(i)n this immigrant nation of dreamers and dissidents . . . no broad consensus regarding the spiritual side of the human condition exists". *Brandon v. Board of Ed. of Guilderland Cent. Sch.*, 635 F.2d 971, 973 (2nd Cir. 1980), *cert. denied* 454 U.S. 1123.

Prior to the enactment of § 16-1-20.1 there existed a statute which prescribed a period of silence for meditation. A group of citizens requested the sponsor of § 16-1-20.1 to introduce "a voluntary prayer bill" in the Senate.[22] As a result of this constituent pressure, Senator Holmes introduced an amendment to the silent meditation statute to include "prayer". No evidence of secular purpose was advanced at trial. On this record § 16-1-20.1 cannot be said to reflect a "clearly secular purpose." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973).

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[21] See generally (J.A., at 47-52).

[22] (*Id.*, at 48).

D. *Alabama Silent Prayer Statute Has the Principal and Primary Effect of Advancing the Religious Practice of Collective Prayer In the Public Schools.*

Alabama's silent prayer statute's failure to satisfy "the purpose" prong of the *Lemon* test renders it unconstitutional. *Stone v. Graham, supra, Lynch v. Donnelly, supra,* at 1362. In addition to having a "wholly" religious purpose, the statute also has a principle and primary effect of advancing religion. In *Larkin v. Grendel's Den, Inc.*, ... U.S. ...., 103 S.Ct. 505 (1982), this Court, with Chief Justice Burger speaking for the majority, recognized the potential for political conflict when governmental action gives even the "appearance" of governmental support for religion:

> . . . The mere *appearance* of a joint exercise of legislative authority by church and state provides a significant *symbolic* benefit to religion in the minds of some by reason of the power conferred. It does not strain our prior holdings to say that the statute can be seen as having a "primary" and "principle" effect of advancing religion (emphasis added).
>
> (*Id.*, at 51)

Justice O'Conner concurring in *Lynch, supra,* echoed these same sentiments:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that makes religion relevant, in reality or public perception, to status in the political community. *Lynch v. Donnelly, supra,* at 1368-1369. (O'Connor, J. concurring).

Justice O'Connor added these constructive comments:

> Every government practice must be judged in its

> *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, the courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.
>
> (Id., at 1369-1370).

When governmental action is directed, as here, to young and impressionable children, it becomes even more important to closely scrutinize the "symbolic" effect of that action. Because of the coercive environment of public school classrooms, a stricter separation of religion is needed in the primary and secondary schools than other government institutions.[23] The Solicitor candidly admits that "the special character of the public school classroom justifiably makes us especially sensitive to possible Establishment Clause problems in that setting". (S.G. Br., at 28).

In finding a similar silent prayer statute unconstitutional, the court in *Duffy v. Las Cruzes Pub. Schools*, 557 F.Supp. 1013 (N.D. Mex. 1983) warned:

> The dangers inherent in the sovereign placing its imprimatur on a religious exercise are particularly acute where children are involved. As established by Gordon Cawearti, an expert in the fields of curriculum and discipline, children are extremely impressionable

[23]*See Widmar v. Vincent*, _____ U.S. _____, 102 S.Ct. 269 where . . . this Court draws a distinction between university students (young adults) and younger students where the former is less impressionable and able to appreciate the University's policy of religious neutrality. *See also Marsh v. Chambers*, _____ U.S. _____, 103 S.Ct. 330, 335, 336 (1983) where the Chief Justice drew a distinction between adult legislators presumably not readily susceptible to religious indoctrinations, and children, who are subject to "peer pressure".

> and easily influenced. They exhibit a tendency to con form with each other in dress and behavior and it is psychologically disturbing for a child to be different from his peers. It is a clear and present danger that the children will perceive a moment of silence as government approval of religion.
>
> (Id., at 1016).

In finding a policy which permitted equal access to public school facilities unconstitutional, the court in *Brandon v. Guilderland Bd. of Education*, 635 F.2d 971, 978 (2nd Cir. 1980) *cert denied*, 454 U.S. 1123 (1981) made the following observation:

> Our nation's elementary and secondary schools play a unique roll in transmitting basic and fundamental values to our youths. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed.

There are a number of factors which give Alabama's silent prayer law the "appearance" of sponsoring religion. The statute prescribes that the meditation or prayer period is to be observed at the "commencement of the first class". This time period is the usual period reserved for school prayer. The length of time allotted is one minute. One minute is approximately the time it would take to recite the Lord's Prayer. The teacher is given the discretion to announce that meditation or prayer may be observed during the silent period. The state's compulsory education machinery is used to provide the audience. Finally, the audience is composed of young impressionable children.

A teacher represents the established order in a classroom and commands respect not unlike that of a judge or mayor.[24] If a student perceives that the teacher intends her period of silence to be used for prayer, then the primary

[24]See R. Dawson, Political Socialization, 49-50 (2d Ed. 1977).

affect will be to advance religion. The "law of intimidation operates, a non-conformity is not an outstanding characteristic of children". *McCollum v. Board of Education,* 333 U.S. 203, 227 (1948).

As in *Duffy, supra,* the state here has chosen to sponsor and actively involve itself in the matter of prayer. "A prayer, however, is undeniably religious and has, by its nature, both a religious purpose and effect (citation omitted). By authorizing a time for prayer in the classroom, the (appellants) have placed the imprimatur of the State on that religious activity". (Id., at 1201).

E. *Alabama Silent Prayer Fosters An Excessive Entanglement of the State Into the Affairs of Religion.*

This Court has acknowledged two distinct types of entaglements; administrative and political divisiveness. *Lemon v. Kurtzman, supra,* at 615-20, 623. The former involves government officials coming into close ongoing contact with the affairs of religious institutions. Id., at 623. It is the potential for political divisiveness generated by Alabama's silent prayer statute which causes the state to become excessively entangled with the affairs of religion.

This Court recognized in *McCollum v. Board of Education,* 333 U.S. 203, 231 that "(t)he public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny. In no other activity of the state is it more vital to keep out divisive forces than in its schools". The potential for political divisiveness is inherent in Alabama's silent prayer program. "(I)t is impossible for the state to promote 'all' religions. Any activity necessarily has greater benefit to religions most suited to make use of it. As a result, not only the nonreligious, but also minority religions suffer because of

their inability to enjoy the benefits of the state's religious programs.[25]

F. *Neither the Free Exercise Clause Nor the Accommodation Doctrine Justify Alabama's Intrusion Into the Affairs of Religion By Prescribing Silent Prayer Periods.*

All the proponents, to a greater or lesser degree, argue that even if the Free Exercise Clause doesn't require the state to organize group prayer periods in the public schools, it permits the state to "accommodate" religious groups in this manner. Such promotion of free exercise is "advancing religion in violation of the Establishment Clause. *Nyquist, supra,* at 788-789.[26] Though the Free Exercise Clause "prohibits" the state from denying the right of *anyone* to practice his beliefs, "it has never meant that the majority could use the machinery of the state to practice its beliefs". *Schempp, supra,* at 226.

> It is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion' and even though it does not aid one religion more than another, but merely benefits all religions alike. *Committee for Public Education v. Nyquist, supra,* at 771.

The Free Exercise Clause does not require setting aside a specific time for silent prayers during the school day. *Duffy, supra,* at 1020. Some are of the opinion that God will hear only those prayers that are performed in a ritual-

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[25]Seide, Daily Monuments of Silence in Public Schools: A Constitutional Analysis, 58 NYUL Rev. 364, 374-75 (1983). In Note 53 Seide cites examples of groups that would not benefit from the state's silent prayer program which includes Taoist, who do not believe in a theistic God, and Moslems, who express their faith in a manner not suited by a one minute of silence.

[26]See also, *Toracaso v. Watkins,* 367 U.S. 488, 495 (1961), *Everson, supra,* at 15; and *Karen B. v. Treen,* 653, F.2d 897, 901 (5th Cir. 1981), *aff'd men.* 455 U.S. 913 (1982).

istic fashion, at certain times, in certain places, and in a prescribed manner. It is precisely because prayer is "serious theological business" that the public school classrooms are ill suited for its purpose. The public school was not intended to foster spiritual growth. Prayer, to the believer, is the highest form of worship—a religious activity capable of developing a spiritual relationship with their God.

Appellants err when they suggest that the statute is neutral between religion and non-religion. To remain neutral the government must not "confer any imprimatur of state approval on any religious sects or practices". *Widmar v. Vincent,* 454 U.S. 263, 274 (1981). The state is not being unneutral to withhold that which the constitution forbids. Nor does the absence of coercion save the statute from the limitations of the Establishment Clause. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. *Engel, supra,* at 430-431.

> Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.
> *Schempp, supra,* at 223.

The Solicitor premises his entire frontal assault on *Zorach v. Clauson,* 343 U.S. 360 (1952). By analogy, the Solicitor argues that the "accommodation" principal established in *Zorach* applies with equal force to the case at bar. *Zorach* offers the government no support. The Court in *Zorach* carefully confined its ruling to the facts of the case.

Zorach involved a New York sponsored program where students were released from the public school buildings and

grounds so that they may go to religious centers for religious instruction or devotional exercises. The Court's holding can be capsuled in the following two paragraphs:

> But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.
>
> (id., at 684).
>
> Here . . . the public schools do no more than accommodate their schedule to a program of outside religious instruction. (id.).

Though the Court did not expressly state that the "accommodation" principle was required by the Free Exercise Clause, it is apparent that such concerns were at the surface of their decision. The Court recognized that the failure to allow off premises release time would burden the Free Exercise rights of the students. The Solicitor has previously acknowledged that there must be come state created burden on religious observance or exercise before the "accommodation" principle comes into play:

> All religious accommodations advance religion in the sense that their effect is to relieve the burden on religious observance that facially neutral rules or practices would otherwise impose.
>
> Br. for the United States as Amicus Curiae in *Estate of Thornton v. Caldor, Inc.,* at 27, cert. granted, (Mar. 5, 1984) No. 83-1158.

The zone of permissible state accommodation is not absolute. The zone extends from a point delineated on one side by *Wisconsin v. Yoder,* 400 U.S. 205 (1972), where the state interest are insufficient to justify the burden of religion, to a point on the other side delineated by *Lemon v. Kurtzman, supra,* where the state accommodated religion to the point of establishment.

II. Alabama Silent Prayer Statute Discriminates Against Some Religions Which Because of Their Liturgy Cannot Enjoy the Benefits of the State's Religious Program.

Though neither of the lower courts so ruled, Alabama silent prayer statute discriminates among sects. The one minute duration of the exercise is closely tailored to only those religions which can satisfy their prayer requirements within this period of time. Several of the world's faith can not exercise their prayer practices within this limitation. The followers of Islam must pray five times a day and bow their heads to Mecca.[27] Further, Muslims must say their prayer while kneeling with their foreheads touching the ground.[28] The International Society of Krishna Consciousness requires the reptitive verbal chanting of the following words continuously:

> Hare Hore Hare Rama
> Hare Rama Rama Rama
> Rama Rama Hare Hare
> Hare Krishna, Hore Krishna,
> Krishna, Krishna.

Alabama's one minute silent prayer statute would not satisfy the prayer needs of Krishna Consciousness followers.[29]

Further, there are some devout Christians to whom any public group prayer is offensive to their religion. To them the words in the gospel Matthew mean what they say:

> And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

[27]Larson, Larson's Book of Cults, at 103 (1982).
[28](*Id.*, at 107).
[29](*Id.*, at 289).

> But thou, when thou prayest, enter into thy closets, and when thou has shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. Mat. 6:5-6.

Finally, there are some religions that do not believe in God and do not have prayer as part of their liturgy.[30] Alabama's silent prayer statute therefore discriminates among religions. For Alabama's silent prayer statute to survive a constitutional challenge, the State must demonstrate a com pelling governmental interest and show that the statute is closely fitted to further that interest. *Larson v. Valante*, ... U.S. ....., 102 S.Ct. 1673, 1675 (1982). We submit that the State has failed to carry its burden.

CONCLUSION

Religion is a private affair between every person and his Maker, in which no third party has any right to interfere. "If everyone is left to judge his own religion, there is no such thing as a religion that is wrong; but, if we are to religion that is right; and, therefore, all the world is right or all the world is wrong.[31] Given this state of affairs, each must be left to go his own way in matters pertaining to religion. "Government should not be allowed, under cover of the soft euphemism of (accommodation) to steal into the sacred area of religious choice". *Zorach, supra,* at 320 (Black, J. dissenting).

Should this Court reverse the Eleventh Circuit and find Alabama's silent prayer law constitutional, the public will receive the clear message that state sponsorship of religious activity is sanctioned. Make no mistake about it, the "effect" of such a ruling will be to advance religion. Tomorrow's headlines will read:

[30]Examples of these are Buddhaism and Taosim.
[31]Paine, *Common Sense II,* at 7.

HIGH COURT HAS GIVEN ITS OK TO STATE ENCOURAGED PRAYERS IN PUBLIC SCHOOLS

Do we really want to go down that road with all of its unforeseen consequences? Do we really need to?

The decision of the Court of Appeals must be affirmed.

Respectfully submitted,

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